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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5556

DATE COMPLAINT FILED: October 5, 2004

DATE OF NOTIFICATION: October 13, 2004

LAST RESPONSE RECEIVED: February 22, 2005

DATE ACTIVATED: August 8, 2005

EXPIRATION OF SOL: September 30, 2009

COMPLAINANT:

John F. Mizner

RESPONDENTS:

Porter for Congress and Edward G. Plonski, in his
official capacity as treasurer

RELEVANT STATUTE
AND REGULATION:

2 U.S.C. § 441d (a)(1) and (d)(1)
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure Documents

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The complaint alleges that Porter for Congress ("the Committee"), the principal authorized committee for Steven Porter's 2004 race for Pennsylvania's 3rd Congressional District, violated Section 441d(d)(1) of the Federal Election Campaign Act of 1971, as amended ("the Act"), by failing to include in a radio advertisement an audio statement by the candidate stating that he had "approved" the communication. *See also* 11 C.F.R. § 110.11(c)(3)(i). Further, the complaint alleges that the Committee's radio advertisement failed to include a disclaimer stating who paid for the advertisement as required by 2 U.S.C. § 441d(a)(1). *See also* 11 C.F.R. § 110.11(b)(1). Although the Committee acknowledges that it inadvertently failed to

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1 include the "paid for" disclaimer in the advertisement at issue, it believes that the candidate
2 complied with the requirements of 2 U.S.C. § 441d(a)(1) by stating in the advertisement that he
3 "endorsed" the communication. For the reasons set forth in more detail below, we recommend
4 that the Commission find reason to believe that Porter for Congress and Edward G. Plonski, in
5 his official capacity as treasurer, violated 2 U.S.C. § 441d(a)(1) with respect to the omission of a
6 "paid for" disclaimer, find no reason to believe they violated 2 U.S.C. § 441d(d)(1) with respect
7 to the candidate's statement of approval
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9 **II. FACTUAL AND LEGAL ANALYSIS**

10 **A. Facts**

11 During the period preceding the 2004 general election, the Committee ran a radio
12 advertisement featuring Steven Porter. Attachment 1.¹ According to the transcript of the
13 advertisement, an announcer first identifies Porter as the Democratic candidate for Congress.
14 Porter then criticizes his opponent, Representative Phil English, and states that, unlike English,
15 he will stand up for children, seniors and all victims of crime, concluding "It's about time we had
16 a representative who did." The announcer then states "Dr. Steven Porter for Congress. This
17 time, vote as though your future depends on it—because it does. Phil English had his chance and
18 failed us." Porter closes the radio advertisement with the statement "I'm Steve Porter and I'm
19 proud to endorse this message." *Id.* The transcript of the advertisement does not include a
20 disclaimer identifying the entity that paid for the communication.

¹ Complainant sent an audiotape and a transcript of the advertisement. The audiotape was damaged, but respondents confirmed that the script provided by complainant was accurate.

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1 The Committee concedes in response to the complaint that the advertisement at issue did
2 not include a disclaimer stating that it had paid for the communication, and that the campaign
3 should have caught the error, but did not. Resp. at 1. According to the Committee, when it
4 discovered the omission, it immediately discontinued running the advertisement. *Id.* The
5 Committee disputes, however, that it violated the candidate approval requirement because “[i]n
6 common parlance, the word ‘endorse’ is equivalent to the word ‘approve. . . .’”

7 The subject advertisement aired on seven radio stations in the Western Pennsylvania area
8 from September 27, 2004 through October 1, 2004. Although the Committee’s response states
9 that the advertisement ran less than 100 times, *id.*, the documents submitted with the response
10 indicate that it ran 127 times. Attachment 2. Specifically, the advertisement aired five times on
11 WJET-AM, 22 times on WRJE-AM, 27 times on WXXC-FM, 18 times on WPIC-AM, 17 times
12 on WWGY-FM, 19 times on WISR-AM, and 19 times on WMGW/WTIV-AM. The Committee
13 did not state in its response the amount it spent for the advertisement’s production costs and
14 advertising spot buys. However, its October Quarterly Report shows disbursements to Vic
15 Rubenstein Associates, the vendor it identified in its response as the producer of the
16 advertisement, on September 16, 2004 and September 23, 2004 for production costs and media
17 buys in the amounts of \$61,879 and \$7,427.90, respectively, which likely are related to the
18 subject advertisement.

19 **B. Analysis**

20 Whenever a political committee of a candidate, like Porter for Congress, makes a
21 disbursement for the purpose of financing any communication through any broadcasting station,
22 such communication must include a disclaimer. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(1).
23 The Act has long required that such communications paid for by the authorized political

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committee of a candidate state that fact. 2 U.S.C. § 441d(a)(1).

Further, pursuant to a newer requirement enacted as part of the Bipartisan Campaign Reform Act of 2002, authorized political committees that make disbursements for radio broadcast communications are subject to an additional requirement. *See* 2 U.S.C. § 441d(d)(1); 11 C.F.R. § 110.11(c)(3)(i). Specifically, any communication transmitted through radio paid for or authorized by a candidate's principal campaign committee shall include "an audio statement by the candidate that identifies the candidate and states that he or she has approved the communication." 11 C.F.R. § 110.11(c)(3). The Commission's regulations include two examples of "acceptable statements that satisfy the spoken statement requirements." *See* 11 C.F.R. §§ 110.11(c)(3)(iv)(A) and (B). Although both examples include the words "I approved," the regulations explicitly provide that the examples "are not the only allowable statements." *Id.*; *see also* Explanation and Justification, "*Regulations on Disclaimers, Fraudulent Solicitation, Civil Penalties and Personal Use of Campaign Funds*," 67 Fed. Reg. 76962, 76967 (December 13, 2002) ("E & J") (noting that "[the examples] are not mandatory and are not the only acceptable disclaimers").

The Committee was required to include a disclaimer in its radio advertisement stating that it had paid for the communication at issue. As noted, in response to the complaint, the Committee admits that it failed to do so. Accordingly, this Office recommends that the Commission find reason to believe that Porter for Congress and Edward G. Plonski, in his official capacity as treasurer, violated 2 U.S.C. § 441d(a)(1).

It does not appear, however, that the Committee violated the Act's candidate approval requirement. *See* 2 U.S.C. § 441d(d)(1); 11 C.F.R. § 110.11(c)(3)(i). The complaint argues that because the candidate used the word "endorse" instead of "approve," the Committee failed to

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1 satisfy the spoken statement requirement. Further, the complaint maintains that these two words
2 have separate functions, noting that “[c]andidates are endorsed” while “political advertisements
3 are approved.” We do not agree.

4 First, while the E & J states that the examples set forth in 11 C.F.R. § 110.11(c)(3)(iv) are
5 meant to “provide a clear ‘safe harbor’” for candidates and authorized committees, as discussed
6 *supra*, the Commission explicitly states in both the E & J and the regulations that the wording of
7 the examples is not mandatory. Second, the dictionary defines “endorse” as “to approve openly
8 <endorse an idea>” and “to express support or approval of publicly and definitely <endorse a
9 mayoral candidate>”. *Merriam-Webster's Collegiate Dictionary*, Tenth Edition (1998).
10 (Emphasis in the original). Given those definitions, and the Commission's regulations that allow
11 for audio statements other than the two “I approved” examples found in 11 C.F.R.
12 § 110.11(c)(3)(iv), the candidate's statement, “I'm Steve Porter and I'm proud to endorse this
13 message,” effectively “approves” the communication.² Under these circumstances, this Office
14 recommends that the Commission find no reason to believe that Porter for Congress and Edward
15 G. Plonski, in his official capacity as treasurer, violated 2 U.S.C. § 441d(d)(1) in connection with
16 the candidate's statement of approval.

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² Contrast MUR 5432 (Stephanie Summers-O'Neal for U S Congress) (Commission conciliated with candidate's authorized political committee where its radio and television advertisements contained no candidate approval statements)

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IV. **RECOMMENDATIONS**

1. Find no reason to believe that Porter for Congress and Edward G. Plonski, in his official capacity as treasurer, violated 2 U.S.C. § 441d(d)(1) in connection with the candidate's statement of approval.
2. Find reason to believe that Porter for Congress and Edward G. Plonski, in his official capacity as treasurer, violated 2 U.S.C. § 441d(a)(1) in connection with the "paid for" disclaimer portion of the advertisement.
3. Approve the attached Factual and Legal Analysis.
- 4.
- 5.

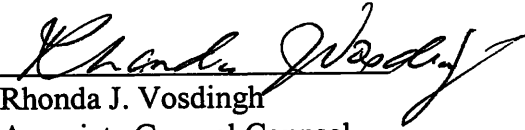
6. Approve the appropriate letter.

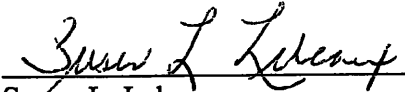
Lawrence H. Norton
General Counsel

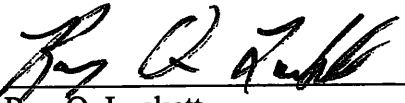
Date

12/30/08

BY:


Rhonda J. Vosdinger
Associate General Counsel
for Enforcement


Susan L. Lebeaux
Assistant General Counsel


Roy Q. Lockett
Attorney

Attachments:

1. Transcript of Porter for Congress Radio Advertisement
2. Copy of Memoranda identifying the number of Radio Advertisement Spots
- 3.
4. Factual and Legal Analysis

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